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91-1958

No. 91-

Supreme Court, U.S.
FILED
JUN 2 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DONALD L. HELLING, et al.,

Petitioners,

v.

WILLIAM McKINNEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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June 1992

QUESTION PRESENTED

Did the court of appeals correctly hold that a non-smoking prisoner who is involuntarily exposed to unhealthy amounts of cigarette smoke has a claim for injunctive relief under the Eighth Amendment, if he can prove that the conditions of his confinement, viewed objectively, pose a serious hazard to his health and that prison officials showed deliberate indifference to his situation?

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Respondent William McKinney respectfully asks the Court to deny the petition for a writ of certiorari for the reasons stated below.

STATEMENT OF THE CASE

McKinney, a Nevada state prisoner, filed this action *pro se* in the United States District Court for the District of Nevada in 1987. His complaint, brought under 42 U.S.C. § 1983, sought damages and injunctive relief based on his involuntary exposure to secondary cigarette smoke or environmental tobacco smoke ("ETS") in the Nevada State Prison in Carson City. Named as defendants were the warden and other Carson City prison offi-

cials; some of them no longer hold those offices, but for convenience we refer to them and, where appropriate, their successors as petitioners.

McKinney, a non-smoker, complained that he was forced to share a cell with a prisoner who smoked five packs of cigarettes a day and that prison officials refused to move him to a single cell or to house him with a non-smoking cellmate, despite his repeated complaints that forced inhalation of smoke was damaging his health. He also objected to the fact that smoking is allowed in the prison library, as it is everywhere in the prison, except the infirmary and the culinary. Two-thirds of the prisoners at Carson City prison smoke (Pet. App. C-19-C-20).

The case was tried to a jury before a magistrate who viewed the complaint as stating two Eighth Amendment claims: (1) deliberate indifference to McKinney's existing medical problems, such as nosebleeds, sore throats and similar cold symptoms, and (2) a constitutional right to be housed in a smoke-free environment (Pet. App. D-2-D-3, C-4).

The magistrate directed a verdict in favor of petitioners after hearing McKinney and other inmates testify as to his first claim, involving his current medical symptoms and their treatment. She acknowledged that the Eighth Amendment bars petitioners from being deliberately indifferent to McKinney's needs, but found no evidence of a serious, existing medical need which was not receiving medical care. She noted the absence of expert or medical testimony showing that petitioners had proximately caused any present injuries and a lack of proof that exposure to ETS could cause the various symptoms of which McKinney complained (Pet. App. C-4, D-7-D-10).

His second claim was also found to be meritless, with the magistrate holding that, as a matter of law, McKinney had no right to be free from cigarette smoke while serving in prison (Pet. App. D-5). In reaching this result, however, the magistrate excluded all evidence except that relating to McKinney's current medical symptoms, including documents relating to the potential future health effects of exposure to ETS (Pet. App. C-4).

The court of appeals unanimously reversed as to this second claim, which is the focus of the petition. The court held that the magistrate erred in framing that issue in "all-or-nothing terms," as that approach "excluded a valid eighth amendment claim lying between these two extremes: that compelled exposure to levels of ETS that pose an unreasonable risk of harm to human health constitutes cruel and unusual punishment" (Pet. App. C-5). Thus, the court ruled that a "reasonable factfinder could conclude that the adverse health effects associated with ETS exposure would be especially severe for McKinney" (Pet. App. C-20).

In holding that the Eighth Amendment may be violated if prisoners are exposed to an "unreasonable" risk to their health, the court of appeals cited scientific evidence, including a 1986 Surgeon General's Report which stated that "a clear judgment can now be made: exposure to ETS is a cause of lung cancer. The data in this Report establish that a substantial number of the lung cancer deaths that occur among nonsmokers can be attributed to involuntary smoking" (Pet. App. C-17). The Report added that the scientific case against involuntary smoking as a health risk "is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke" (Pet. App. C-18). The court also cited a 1990 draft report by the Environmental Protection Agency which estimated that some 3800 deaths each year among nonsmokers in the United States could be attributed to ETS, which EPA classifies as a Group A (known human) carcinogen, along with such substances as arsenic, asbestos, benzene, chromium compounds and vinyl chloride (Pet. App. C-18-C-19).

In assessing the evolving standards of decency in this area, the court of appeals noted that there were widespread bans on smoking in public places and confined areas, adding that: (1) The federal prison system had moved to protect non-smokers; (2) The American Jailers Association, representing 6500 jail administrators, has backed a ban on smoking in prisons; and (3) As of May 1990, county and state corrections departments in 13 states had either banned or were considering a ban on cigarette smoking in prison (Pet. App. C-27-C-29).

The court of appeals thus concluded that McKinney had stated a claim for injunctive relief and that he "should be allowed to present evidence regarding the level and degree of his exposure to ETS and whether that degree of exposure is sufficient to create an unreasonable risk of harm to his health" (Pet. App. C-30). Citing a lack of evidence upon which to base any conclusions about which conditions actually posed an unreasonable risk of harm to McKinney's health, the court remanded to the district court for factfinding on these issues (Pet. App. C-47 n.29).[1]

Petitioners sought rehearing and suggested a need for *in banc* review. The panel denied rehearing on 14 May 1991, noting that no judge had requested a vote on the suggestion for *in banc* review (Pet. at 4).

Petitioners then sought review in this Court (No. 91-269). On 15 October 1991 the Court granted the petition, vacated the judgment and remanded the case to the court of appeals for further consideration in light of the intervening decision in *Wilson v. Seiter*, 111 S. Ct. 2321 (1991). *Helling v. McKinney*, 112 S. Ct. 291 (1991), *as amended*, *id.* at 963 (1992)(Pet. App. B-1-B-2).

Wilson clarified that an Eighth Amendment challenge to prison conditions consists of two parts: an objective component, which asks whether the injury complained of is sufficiently serious

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1 The court added that the trial court should consider appointing counsel to represent McKinney on remand (Pet. App. C-30). In fact, a Nevada attorney has agreed to represent him in the district court on remand (Pet. App. A-6).

The court of appeals also resolved a number of issues which are not before this Court. Specifically, it upheld the magistrate's entry of a directed verdict as to McKinney's first Eighth Amendment claim about his existing medical symptoms (Pet. App. C-39-C-40); ruled that he could not pursue a damages claim because petitioners enjoy qualified immunity for their actions (Pet. App. C-31); held that a Nevada anti-smoking law applies to state prison libraries (Pet. App. C-32-C-35); and upheld the magistrate's denial of McKinney's request for preparation of a trial transcript at state expense (Pet. App. C-40-C-42). The court also reversed the magistrate's ruling that she lacked the power under Rule 706, Fed. R. Ev., to appoint an expert to testify, at state expense, on smoking and health issues, and it recommended that such an expert be appointed on remand (Pet. App. C-35-C-38).

to warrant constitutional protection, and a subjective component, which asks whether prison officials acted with a sufficiently culpable state of mind. *Id.* at 2324. *Wilson* specified that the subjective element is met in prison condition cases only if the prisoner can satisfy the standard used in cases alleging a failure to address "serious medical needs," *i.e.*, "deliberate indifference" to the prisoner's condition. *Id.* at 2323.

On remand, the court of appeals received supplemental briefs, and on 27 March 1992 it issued an order reinstating its previous judgment (Pet. App. A-1-A-7). The court observed that by establishing a subjective component to McKinney's Eighth Amendment claim, *Wilson* "simply adds another element to [that] claim which McKinney must prove" (Pet. App. A-6), adding that *Wilson* did "not vitiate our determination of what satisfies the objective component" of his claim (Pet. App. A-5). The court did, however, modify its earlier opinion in light of *Wilson* to make clear that "hous[ing] a prisoner in an environment that exposes him to levels of ETS that pose an unreasonable risk of harming his health constitutes the objective component of McKinney's Eighth Amendment claim" (Pet. App. A-5-A-6), though the prisoner must also satisfy the subjective requirement in order to prevail. Accordingly, the case was remanded to the district court "for further proceedings consistent with this court's previous opinion" and with *Wilson* (Pet. App.).

Before explaining why review should be denied, we are obliged to note a factual development which the petition fails to mention. About the time the court of appeals issued its first opinion allowing McKinney to pursue a claim for injunctive relief regarding conditions at the Carson City prison, he was moved to Ely State Prison. Thus, the record contains no facts regarding the conditions of his confinement at Ely with respect to his exposure to cigarette smoke, nor is it clear how long he will remain there. We noted this fact in opposing the earlier petition, and petitioners replied that they reserved the right to transfer him back to Carson City, and thus the controversy remained a live one. Reply Memorandum for Petitioners, *Helling v. McKinney*, No. 91-269, at 3-4. However, we note that McKinney is still at Ely and that most of the current petitioners appear to have responsibilities only at

Carson City. These facts, as well as the fact that McKinney will likely have to amend his complaint in any event to respond to the intervening decision in *Wilson*, argue against granting review in this case.

REASONS FOR DENYING THE WRIT

Contrary to petitioners' assertions, the circuits are not in conflict, and the issues presented do not warrant review, which in any event would be premature, as the court of appeals merely held that McKinney's handwritten, *pro se* complaint stated a claim for relief which is cognizable under the objective component of the Eighth Amendment. The district court received no evidence on this point or on the subjective portion of any such claim, as *Wilson* requires. Thus, the implications of the decision below are uncertain at this time.

1. Before answering the specific arguments raised by petitioners, it may be useful to address a theme which seems to underlie the petition, namely, that allowing the decision to stand would have a devastating effect on prison systems in terms of cost, prison management and new litigation. *See* Pet. at 10. At this point in the case, and on this record, there is no basis to conclude that the decision below will have that type of impact, either in Nevada or elsewhere, and there are several factors which undercut the claim of wide-spread disruption.

First, the entire federal prison system has already acted to separate non-smoking prisoners from cigarette smokers. *See* 28 C.F.R. §§ 551.160-551.163 (federal prison officials must designate smoking and non-smoking areas and, "[t]o the extent practicable," place non-smoking inmates in non-smoking quarters; double celling of smoker and non-smoker to be "avoided except where impractical due to circumstances, and then may be done only for limited duration"). The same is also true in various state systems, as the court of appeals noted. *See* Pet. App. C-27-C-29); *see also West v. Wright*, 747 F. Supp. 329, 332 (E.D. Va. 1990) (describing steps to protect non-smokers in state prison system). Separating prisoners in this fashion should significantly reduce the number of complaints from non-smoking prisoners.

Moreover, even in state prison systems within the Ninth Circuit, where the ruling below applies directly, some systems already protect non-smoking prisoners. Alaska's law against smoking in public places expressly bars smoking in "a correctional facility." Alaska Stat. § 18.35.300(10)(1991). In Idaho, Executive Order No. 92-2 recently established a no-smoking policy in state buildings and gave responsibility for setting policy to local prison heads; the Idaho Department of Corrections advises that each warden in that state has designated non-smoking areas in housing units and common use areas for inmates.

In Montana, the warden of the Montana State Prison adopted a Policy Statement (No. MSP 03-001, effective 15 December 1986 and revised in September 1989) which does not adopt a smoking/non-smoking restriction for inmate housing, but declares inmate common buildings as non-smoking areas, adding (at 2) that "[p]assive smoke inhalation is a health hazard." And the Washington State Department of Corrections issued Division Directive No. DOP 190.500, effective 1 January 1989, which eliminated smoking within all inmate working and break areas and added that, when possible, "an attempt will be made to house non-smoking inmates together" or to establish non-smoking tiers, tier sections or cells if enough prisoners are non-smokers.

Thus, the practical consequences of the decision below are likely to be limited, particularly since inmates must not only prove an objective violation, but must satisfy in addition the subjective standard in *Wilson v. Seiter*. We also turn now to the particular bases cited for granting review.

2. The petition tries (at 12-18) to show that the circuits are split, but a close reading of the cited cases demonstrates that there is no conflict between them and the decision below with respect to the Eighth Amendment issue posed here. Petitioners rely heavily on the recent *in banc* opinion in *Clemmons v. Bohannon*, 956 F.2d 1523 (10th Cir. 1992), but despite some superficial similarities, the case is distinguishable.

Clemmons upheld a grant of summary judgment against a prisoner who complained of his confinement with a smoking

cellmate. *Id.* at 1525. There, as here, the court found no evidence that he was *presently* suffering serious medical harm. *Id.* at 1526-27. The prisoner also made a second claim (arguably similar to McKinney's) that this exposure to cigarette smoke "may lead to more serious carcinogenic effects." *Id.* at 1527. But at this juncture, *Clemmons* diverges from this case in several key respects.

The prisoner in *Clemmons* was allowed to submit evidence on his second claim in opposition to the state's summary judgment motion, but his evidence consisted merely of a flyer from the local chapter of the American Lung Association about the noxious ingredients in cigarette smoke, a news article mentioning the Surgeon General's finding about passive smoking, and an article about the General Services Administration's change in policy to favor nonsmokers in government facilities, none of which helped establish how the particular conditions of his particular confinement might adversely affect him. *Id.* at 1527.

Summary judgment for the prison officials might well be appropriate in that case on that record, but *Clemmons* cannot be stretched as far as petitioners seek here, namely, to extinguish the possibility of *any* cause of action (no matter what evidence an inmate may muster), particularly when, as here, the magistrate denied McKinney the opportunity to introduce *any* evidence on this claim (Pet. App. C-4).

Thus, the holding in *Clemmons* does not establish that a prisoner cannot succeed even if he were able to present competent, admissible evidence about the health hazard presented by his exposure to cigarette smoke. To be sure, *Clemmons* did add *dicta* in response to the dissenting opinion to the effect that the Eighth Amendment "does not sweep so broadly as to include possible latent harms to health," and that neither this Court nor the Tenth Circuit has held that "a potential, distant harm to a prisoner's health is a serious medical need." *Id.* at 1527. But *Clemmons* did not cite any case which expressly bars such a result, nor did it address cases such as *Powell v. Lennon*, 914 F.2d 1459, 1464 & n.10 (11th Cir. 1990), which allowed a prisoner to pursue an Eighth Amendment claim based upon deliberate indifference

to his request for placement in an asbestos-free environment, or *Franklin v. State of Oregon*, 662 F.2d 1337, 1346-47 (9th Cir. 1981), which allowed a claim to proceed when an inmate suffering from throat cancer was housed with a cigarette smoker.

For these reasons, review is not warranted on the basis of a conflict with *Clemmons*. Moreover, if the Court did wish to consider application of the Eighth Amendment to health hazards with long latency periods, this case is not a suitable vehicle for exploring them, arising as it does on a decision holding only that there may be a cause of action in such circumstances, with no other cases analyzing that precise issue, especially in light of *Wilson v. Seiter*.

The other appellate rulings cited by petitioners also do not conflict with the decision below. In *Johnson v. Moore*, 926 F.2d 921 (9th Cir. 1991), the authorities responded to the prisoner's complaint of double celling with a heavy smoker by moving him to another cell; McKinney's complaint is that the authorities did *not* respond to his objection about double celling with a five-pack-a-day cellmate. *Kensell v. State of Oklahoma*, 716 F.2d 1350 (10th Cir. 1981), did not involve the Eighth Amendment, and *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir. 1989), involved a prisoner's effort to relitigate his 1980 defeat in a case challenging exposure to secondary cigarette smoke, with the focus of the opinion on the res judicata issue. Finally, *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991), can be distinguished because it purported to be a class action seeking to create a smoke-free environment in Illinois prisons, and it lacked the sort of focused claim which the court of appeals recognized here. Indeed, *Steading* took pains to add that prisoners "who can attribute their serious medical conditions to smoke, are entitled to appropriate medical treatment, which may include removal from places where smoke hovers," but that was not the claim the prisoner was pursuing there. *Id.* at 500.

Nor do the district court decisions cited by petitioners (at 18-22) bolster the case for review. Some hold that an Eighth Amendment claim may be stated in some situations, *Beeson v. Johnson*, 668 F. Supp. 498 (E.D.N.C. 1987); *Avery v. Powell*, 695 F. Supp. 632 (D.N.H. 1988), while those reaching an opposite conclusion were correctly distinguished by the court of appeals

(Pet. App. C-44 n.3) on the ground that the complaints there asserted a more sweeping right to an utterly smoke-free environment. *Gorman v. Moody*, 710 F. Supp. 1256 (N.D. Ind. 1989); *Caldwell v. Quinlan*, 729 F. Supp. 4 (D.D.C.), *aff'd mem.*, 923 F.2d 200 (D.C. Cir. 1990), *cert. denied*, 112 S. Ct. 291 (1991). Another case was dismissed based on pleading deficiencies, *Lee v. Carlson*, 645 F. Supp. 1430 (S.D.N.Y. 1986), while in *West v. Wright*, *supra*, the court was "not called upon to determine whether the indefinite confinement of a nonsmoking prisoner against their [sic] will in a cell with a smoker implicates the Eighth Amendment" because it was "undisputed" that the prison authorities had "implemented significant safeguards for the protection of nonsmokers, including the opportunity to be assigned to a nonsmoking cell with a fan, output and input vents, and a window that may be opened." 747 F. Supp. at 332.

3. The balance of the petition contains a potpourri of objections to the way the court of appeals decided this case, none of which is sufficiently weighty to warrant this Court's consideration. If anything, these objections, when taken together, suggest that this case is quite factbound, and the incomplete nature of the record argues for letting it proceed next in the district court, not this Court.

Petitioners first chide the court of appeals (at 23-25) for not reversing itself based on the fact that the Nevada legislature responded to the first appellate ruling here by promptly amending its law barring smoking in "public buildings" to declare that facilities used to house or serve inmates are not "public buildings" under that law (Pet. App. F-1, F-7). That law has no effect on McKinney's claim because a legislative determination that smoking should not be banned entirely from a state prison system does not, as petitioners claim, alter the mandates of the Eighth Amendment or allow prison officials to disregard specific complaints about unhealthy conditions. *See Franklin v. State of Oregon*, *supra* (double celling heavy smoker with prisoner suffering from lung cancer).

Moreover, the new statute appears to be aimed at the portion of the decision below which specifically held, based on an

advisory opinion of the Nevada Attorney General, that the pre-existing ban on smoking in libraries applied to prison libraries (Pet. App. C-32-C-35). The effect of this new law on that portion of McKinney's complaint dealing with smoking in the library is thus an issue which is best suited to resolution by the district court, and the court of appeals was surely on solid ground in remanding the case for that purpose.

Some of petitioners' other complaints (that the issues framed by the magistrate were those framed by the parties and that McKinney's phrasing of the issue presented on appeal is broader than the issue actually decided, *see* Pet. at 25-28), really amount to little more than petitioners' disagreement with the court of appeals' decision to treat McKinney's handwritten, *pro se* papers with the deference often accorded *pro se* litigants, rather than applying a more rigorous standard of pleading and proof that might have been appropriate had he been represented by counsel. The broad Eighth Amendment claim which the magistrate found insufficient as a matter of law, and McKinney's request for reversal of that ruling, reasonably embrace the more focused Eighth Amendment claim identified by the court of appeals, and there is no basis for granting review on this ground.

Along the same line, petitioners complain that the court of appeals unfairly deprived them of an opportunity to submit detailed briefs before holding that an Eighth Amendment claim may exist between the two extremes cited by the magistrate, claiming that they would have produced "evidence" on the difficulties they perceive in "classifying and housing inmates within the limitations of budget, facilities, and securities concerns." Pet. at 28. Apart from the fact that petitioners never sought to fill that void on remand from this Court, appellate courts do not sit to receive evidence, and to the extent that petitioners claim (at 29) that they have (unspecified) scientific or other evidence which would rebut an objective claim under the Eighth Amendment, they are really saying that there is a genuine factual dispute, which is better addressed by the district court, not this Court.

4. The petition also asserts as a separate ground for granting review that the decision below misapplied *Wilson v. Seiter*, but the

discussion of *Wilson* merely restates earlier points without adding anything new which would warrant granting review.

Petitioners argue (at 29-33) that the subjective element in *Wilson* was not met here because McKinney failed to show that petitioners acted with the requisite intent to violate his Eighth Amendment rights. They cite that portion of the magistrate's opinion which dismissed McKinney's claim of inadequate medical care (Pet. App. D-7-D-10), but that discussion is not germane because it involves his *first* claim, which focused on petitioners' response to McKinney's then existing cold-like symptoms. No evidence was heard on his *second* claim about prison conditions (the subject of this petition) because the magistrate held, as a matter of law, that McKinney had failed to state a claim for relief.

As for the objective element, petitioners essentially restate (at 33-37) their disagreement with the decision below. Their principal objection seems to be that McKinney made no showing that "his health or safety had been seriously threatened by exposure to secondary tobacco smoke" (Pet. at 35)(emphasis omitted), conveniently ignoring the fact that the magistrate did not allow him to present evidence on that issue. And to the extent they complain of a lack of opportunity to present "their own evidence to contest McKinney's legally insufficient facts" (*id.*), a remand to the district court will provide them with precisely that opportunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 1992